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ORIGINAL

January 5, 2004

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte
CCB/CPD File No. 01-06
WC Docket No. 03-173

Dear Ms. Dortch:

On March 6, 2001, Mpower Communications Corp. filed a petition for declaratory ruling requesting that the Commission clarify the requirements of TELRIC with respect to loop conditioning charges.[1] In the proceeding initiated by the *TELRIC NPRM*,[2] the Commission is examining issues raised by Mpower's petition.[3] Accordingly, Mpower withdraws its previously filed petition. Mpower additionally files its petition in Docket No. WC 03-173 for consideration by the Commission as part of the record in that proceeding.

Sincerely,

Patrick J. Donovan
Counsel for Mpower Communications Corp.

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1 *Mpower Communications Corp Files Petition for Expedited Declaratory Ruling on TELRIC Pricing Standards for Loop Conditioning Charges*, Public Notice, CCB/CPD No 01-06, DA 01-684, March 16, 2001.

2 *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and Resale of Service by Incumbent Local exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 03-173, FCC 03-224, released September 15, 2003

3 *Id* Paras 114-130

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Application of TELRIC	)	CC Docket No. ____
Pricing to Loop Conditioning	)	

PETITION FOR EXPEDITED DECLARATORY RULING

March 6, 2001

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Summary

In the past, devices (e g., load coils, bridged tap, repeaters, etc.) were added to a copper pair to provide network flexibility or to enhance the ability of the loop to deliver voice grade services. While these devices may have once been beneficial to the provision of voice services, they generally have a detrimental effect on a provider's ability to provision data services As a result, these devices must often be removed prior to the delivery of DSL services In this petition, the term "loop conditioning" will be used to identify the process whereby load coils, repeaters, bridged tap or other devices that negatively impact the provision of advanced services are removed from copper facilities.

In its *First Report and Order* and *UNE Remand Order*, the FCC allowed the ILEC to recover the costs of loop conditioning. The Commission, however, explicitly made the recovery of such costs dependent upon the application of the forward-looking TELRIC standard. Importantly, the Commission did not specify whether these costs should be recovered through the TELRIC-based monthly recurring loop charge or through a separate nonrecurring loop conditioning charge. As with other costing decisions, the determination of the proper amount of loop conditioning costs has been deferred to the individual state commissions.

Recent state commission decisions on loop conditioning clearly reflect confusion regarding the utilization of a forward-looking standard to set prices largely applicable to the historical embedded telecommunications network This confusion has manifested itself not only in a wide disparity of methodologies used to recover loop conditioning charges, but also in the magnitude of costs reached under those methodologies Given the limited capital resources of alternative telecommunications providers, these conditioning costs have resulted in the diversion of capital dollars from the deployment of DSLAMs and switches. Moreover, these conditioning costs act as a barrier to CLEC entry into certain geographic markets.

In this petition, Mpower asks the Commission to reaffirm its commitment to the TELRIC pricing methodology. Inherent within this renewed commitment is the adoption of three specific clarifications detailed in this petition. Once implemented, these clarifications should: (1) result in an increased uniformity of state regulatory decisions; (2) provide a greater certainty for the capital markets and (3) stimulate an increased deployment of advanced services technologies. Moreover, these clarifications will protect the careful balance of state and federal jurisdiction by leaving state commissions free to decide on modeling assumptions and prices.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Application of TELRIC	)	CC Docket No. ____
Pricing to Loop Conditioning	)	

PETITION FOR EXPEDITED DECLARATORY RULING

In this petition, Mpower will show that, although the FCC has promulgated forward-looking pricing rules regarding loop conditioning, there is widespread confusion regarding the application of those forward-looking pricing rules to an activity largely based upon an embedded network. Some incumbent LECs have taken advantage of this confusion by asserting a blanket authorization for assessing a separate nonrecurring loop conditioning charge and, where not yet approved by state utility commissions, unilaterally imposing astronomical loop conditioning rates Contrary to the dictates of the Act, the position of these ILECs have served as a barrier to the widespread offering of advanced services In response to this problem, Mpower requests that the FCC clarify the requirement that loop conditioning costs be based upon the TELRIC pricing standard.[1] It is important to note that the solution proposed in this petition does not seek the implementation of new federal policy, but instead, relies upon the clarification of previous FCC statements regarding the recovery of loop conditioning costs.

[1] It is important to understand that this petition addresses the treatment of loop conditioning costs The actual loop conditioning activity must still be performed by the ILEC prior to the provisioning of DSL services The sole issue concerns how the ILEC should be compensated for the costs of performing this conditioning services.

I. INTRODUCTION

In the preamble to the Telecommunications Act of 1996 ("Act"), Congress explicitly stated that one goal of the Act was to "encourage the rapid deployment of new telecommunications technologies."[2] As interpreted by the FCC, this fundamental goal is neutral both as to technology and provider.

> One of the fundamental goals of the Telecommunications Act of 1996 is to promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, in order to stimulate competition for all services, including advanced services.[3]

As with voice services, the FCC has also recognized the goal that the advanced services envisioned by the Telecommunications Act should be "available to all Americans on a reasonable and timely basis."[4]

Based partially on the actions of the FCC, the data market has experienced a tremendous growth in recent years, whereas growth in the number of voice lines has increased at a modest rate. For instance, in North Carolina, the demand for analog lines has increased by only 38.37% since 1992. Over the same period of time, the demand for digital access lines (provided primarily by the ILEC which does not charge its retail customers for loop conditioning) has increased by 327.23%.[5]

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[2] Preamble to Pub. L. 104-104, 110 Stat. 56 (1996).

[3] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998) ("*Advanced Services Order and NPRM*") at ¶1 (emphasis added).

[4] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 3089 (2000) at ¶1. (emphasis added).

[5] *General Proceeding to Determine Permanent Pricing for Unbundled Network Elements*, North Carolina Utilities Commission Docket No. P-100, Sub 133d, Panel Testimony of Michael Starkey and Eric McPeak (filed August 11, 2000) at page 137.

Despite the growth experienced in the data market, the issue of loop conditioning has represented a lingering obstacle toward fulfilling the Congressional goals of making advanced services "available to all Americans on a reasonable and timely basis" as well as promoting "innovation and investment by all participants".

Generally, the term "loop conditioning" has been used to identify the process whereby certain devices that negatively impact the provision of advanced services are removed from copper facilities In the past, devices (e g., load coils, bridged tap, repeaters, etc.) were added to a copper pair to provide network flexibility or to enhance the ability of the loop to deliver voice grade services. While these devices may have once been beneficial to the provision of voice services, they generally have a detrimental effect on the CLEC's ability to provision advanced services. As a result, these devices must often be removed prior to the delivery of DSL services.

Given the CLEC's dependence upon ILEC conditioned loops, concerns have arisen that some ILECs may attempt to impair the CLEC's ability to fulfill customer desire for data services by inflating the charge for loop conditioning

> We recognize, however, that the charges incumbent LECs impose to condition loops represent sunk costs to the competitive LEC, and that these costs may constitute a barrier to offering xDSL services. We also recognize that incumbent LECs may have an incentive to inflate the charge for line conditioning by including additional common and overhead costs, as well as profits [6]

Consistent with the FCC's initial concerns, loop conditioning costs have become a barrier to the widespread offering of advanced services by CLECs For instance, in California, a CLEC will be charged $824.15 by Pacific Bell to remove load coils from a customer's loop. Recognizing that it is difficult to pass costs of this magnitude on to customers, CLECs have been

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), (*"UNE Remand Order"*) at ¶194

forced to absorb these costs and hope that they are offset over the course of providing service to the customer

II. CURRENT FEDERAL PRICING POLICY

A. Need for a National Pricing Policy

In August 1996, the FCC issued its *First Report and Order* in the Local Competition Docket.[7] As ordered by Congress, this Report and Order was designed to establish regulations to implement the Act.[8] One section of the FCC's Order established a national policy framework for the pricing of interconnection and unbundled elements.[9]

In that Order, the FCC recognized the beneficial effect of a national pricing policy framework. As viewed by the FCC, the establishment of a national pricing policy would help stimulate local competition by: (1) reducing or eliminating inconsistent state regulatory requirements, (2) increasing the predictability of rates and (3) facilitating negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers.[10]

> [N]ational rules should reduce the parties' uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings, which will reduce regulatory burdens for all parties including small incumbent LECs and small entities. . Failure to adopt national pricing rules, on the other hand, could lead to widely disparate state policies that could delay the consummation of interconnection arrangements and otherwise hinder the development of local competition. Lack of national rules could also provide opportunities for incumbent LECs to inhibit or delay the interconnection efforts of new competitors, and create great uncertainty for the industry, capital markets, regulators and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital."[11]

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[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*First Report and Order*")

[8] Section 251(d)(1)

[9] *First Report and Order* at Section VII

[10] *Id* at ¶105

[11] *Id* at ¶114

B. Total Element Long Run Incremental Cost (TELRIC) Standard

After recognizing the benefits that would result from the establishment of a national pricing policy, the FCC went on to discuss the benefits of individual pricing methodologies. The FCC reviewed several different pricing methodologies and found that a "pricing methodology based on forward-looking, economic costs best replicates, to the extent possible, the conditions of a competitive market."[12] The FCC noted that "[b]ecause a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier to produce efficiently and to compete effectively, which should drive retail prices to their competitive levels."[13]

Despite the contention of several ILECs that forward-looking studies are "inherently so hypothetical as to be of little or no practical value," the FCC found that many state commissions had already implemented forward-looking methodologies such as total service long run incremental cost (TSLRIC) to price various telecommunications services.[14] Noting that the newly adopted methodology would be applied to network elements instead of telecommunications services, the FCC coined the term "total element long run incremental cost" (TELRIC).[15]

In its Order, the Commission implicitly rejected the inclusion of any embedded costs by defining TELRIC to include only forward-looking incremental costs.[16] Furthermore, the FCC

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[12] *Id* at ¶679

[13] *Id*

[14] *Id* at ¶681

[15] *Id* at ¶678

[16] *Id* at ¶690

included in the definition of TELRIC a requirement that these forward-looking costs be based on the "most efficient technology available."[17] In addition to this implicit definitional rejection of embedded costs, the Commission also explicitly rejected the recognition of any embedded costs

> The substantial weight of economic commentary in the record suggests that an "embedded cost"-based pricing methodology would be pro-competitor - - in this case the incumbent LEC - - rather than pro-competition. We therefore decline to adopt embedded costs as the appropriate basis of setting prices for interconnection and access to unbundled elements [18]

Once the TELRIC standard was selected, the FCC recognized that its work was not complete "In the aftermath of the arbitrations and relying on the state experience, we will continue to review this costing methodology, and issue additional guidance as necessary."[19] Almost five years later, the state commissions and the CLEC industry are still in need of "additional guidance" as to the applicability of the TELRIC standard to loop conditioning activities. As will be shown, contrary to the stated goal of a national pricing policy, the failure to provide additional guidance has resulted in inconsistent state regulatory decisions. Mpower urges the FCC to provide the additional guidance which is needed on the applicability of TELRIC to loop conditioning.

C. FCC Precedent on Loop Conditioning

In the *First Report and Order*, the FCC first addressed the issue of loop conditioning. In its Order, the FCC placed the affirmative duty upon the ILEC to condition loops for advanced services.

> Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers

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[17] *Id*

[18] *Id* at ¶705

[19] *Id* at ¶620 (emphasis added)

> to provide services not currently provided over such facilities. For example if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. . . . The requesting carrier would, however, bear the cost of compensating the incumbent LEC for such conditioning.[20]

Despite allowing recovery of the costs for conditioning, the FCC made the express qualification that recovery of conditioning costs would be based upon the TELRIC pricing standard.[21]

In a later Order, the FCC again had the opportunity to address recovery of conditioning costs. "We now clarify that we require the incumbent to provide loops with all their capabilities intact, that is, to provide conditioned loops, wherever a competitor requests, even if the incumbent is not itself offering xDSL to the end-user customer on that loop."[22] Similar to its prior decision, the FCC decided that the recovery of any conditioning costs must be premised upon the TELRIC pricing standard.[23]

Consistent with its previous decision that pricing for unbundled elements should be done at the state level, the FCC deferred the application of the TELRIC standard to the state commissions. "We defer to the states to ensure that the costs incumbents impose on competitors for line conditioning are in compliance with our pricing rules for nonrecurring costs."[24]

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[20] *First Report and Order* at ¶382.

[21] *Id* at footnote 830

[22] *UNE Remand Order* at ¶191

[23] *UNE Remand Order* at ¶¶ 193-194, footnote 368 and 369)

[24] *UNE Remand Order* at ¶194

D. The 8th Circuit Decision Has No Impact on Proper Loop Conditioning Cost Recovery.

Since issuing its orders mandating the use of the TELRIC pricing methodology for the calculation of loop conditioning rates, the 8th Circuit Court of Appeals issued its decision reviewing the Commission's national pricing methodology.[25] ILECs have argued that the 8th Circuit Court's Decision to vacate and remand rule 47 C.F.R. §51.505(b)(1) dictates that they be allowed to recover costs associated with removing load coils, bridged tap and other equipment from their existing network (i.e., use of embedded pricing). Further, these ILECs may contend that even though the forward looking cost studies used to support their own unbundled loop rates would not contain these disruptive devices, to assume that these devices do not exist is akin to assuming the use of a hypothetical network, and hence, incongruent with the *8th Circuit Decision* These arguments are misplaced While ILEC rates intended to recover costs associated with the removal of load coils, bridged tap and other outdated, disruptive devices would unarguably be rejected on the basis of 51.505(b)(1), that rule is not the basis upon which the FCC should reject ILEC charges for these activities.

First, simple consistency requires that loop conditioning rates be rejected. Independent of the *8th Circuit Decision* and its impact on the so-called "hypothetical network" assumption, the fact remains that ILECs across the nation have currently effective, monthly recurring charges based upon cost studies assuming forward looking network assumptions that the ILECs designed and advocated before state commissions [26] These cost studies assume network designs wherein

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[25] *Iowa Utilities Board, et al v Federal Communications Commission*, 219 F 3d 744 (C A 8)(2000) ("*8th Circuit Decision*").

[26] There is no question that the FCC's rule requiring the use of a forward looking pricing methodology survived the decision of the 8th Circuit Court of Appeals This forward looking pricing methodology remains in effect and is the basis for the studies from which the state commission derived monthly recurring loop charges

disruptive devices would not be present. Allowing ILECs to establish monthly recurring rates based upon a given forward looking network design, but then allowing them to specifically ignore that same design when establishing non-recurring charges (specifically loop conditioning costs), simply is not consistent and allows the ILEC to double recover its expenses. Despite disagreements regarding what a lawful, forward looking network design might entail, certainly reasonable people would agree that the same network design must be assumed when setting all UNE rates. Yet, ILEC arguments supporting separate non-recurring loop conditioning costs violate this simplest principle

Second, when initially providing guidance to state commissions on proper loop conditioning cost recovery, the FCC required that such charges be consistent with its TELRIC rules The FCC did not point state commissions to the hypothetical network rule initially vacated by the *8th Circuit Decision* - 57 C.F.R. §51 505(b)(1). Instead, the FCC pointed state commissions to rule 51.507(e) and paragraphs 368, 749-751 of its *First Report and Order.*[27] Neither rule 51.507(e), nor the principles incorporated in the supporting text from the *First Report and Order*, were impacted by the *8th Circuit Decision.* Yet, it is within rule 51.507(e) and its supporting paragraphs from the *First Report and Order* that the FCC specifically rejects nonrecurring costs that would "recover more than the total, forward-looking economic cost of providing the applicable element."[28] Likewise, it is within these same paragraphs that the FCC states· "We require, however, that state commissions take steps to ensure that incumbent LECs do not recover nonrecurring costs twice and that nonrecurring charges are imposed equitably

[27] See. *UNE Remand Order* at ¶¶ 192-194 including ftnts 368 and 369.

[28] 47 C F R §51 507(e)

among entrants "[29] It is upon these rules, not vacated rule 47 C.F.R. 51.505(b)(1) that the FCC should rely upon in rejecting separate loop conditioning nonrecurring costs. These rules remain unaffected by the *8th Circuit Decision*.

Finally, it is important to note that the *8th Circuit Decision* has been stayed pending further guidance from the U.S. Supreme Court. Hence, rule 47 C.F.R. §51.505(b)(1), and its requirement that only those costs incurred in an efficient, least-cost network be recoverable, remains in effect

III. CURRENT FCC PRICING RULES ARE CONFUSING AND HAVE BEEN APPLIED INCONSISTENTLY BY THE STATES

Inconsistency between state commissions undermines the fundamental rationale advanced by the FCC for establishing a national pricing standard. The "uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings" demands that the FCC provide clarification regarding the TELRIC pricing standard.

To date, a number of state commissions have addressed the issue of pricing for loop conditioning. Despite extensive experience with interpreting and applying the TELRIC standard in previous UNE pricing dockets, many state commissions have struggled with the paradox of utilizing a forward-looking standard to set prices largely applicable to the historical embedded telecommunications network In their attempts to resolve this paradox, several state commissions have reached diametrically opposite outcomes

As the following discussion indicates, while some state commissions have denied recovery of any conditioning costs, other state commissions have allowed the ILEC to recover such costs. More confusing still, of those state commissions that have allowed recovery, some

[29] *First Report and Order* at ¶750

have included these costs within the monthly recurring loop charge while the majority have provided for recovery through a separate nonrecurring charge.

A. New York

In 1997, the New York Public Service Commission issued its decision setting permanent rates for the unbundled network elements of New York Telephone.[30] In that order, the New York Public Service Commission considered the makeup of the local loops designed by various models. As proposed by the ILEC, "New York Telephone's model contemplated ubiquitous deployment of integrated DLC (IDLC) technology, implying that, with limited exceptions, all feeder plant used optical fiber rather than copper."[31] Utilizing the FCC mandated TELRIC pricing policy and despite criticisms from CLECs that copper is cheaper than fiber for relatively short loops, the New York Public Service Commission adopted the use of the 100% fiber feeder model [32]

More than two years later, the New York Public Service Commission addressed issues related to the provisioning of digital subscriber line services.[33] Included in the issues considered by the New York Public Service Commission were separate nonrecurring rates for loop conditioning In light of the Commission's adoption of the 100% fiber feeder assumption, many CLECs challenged the propriety of assessing a separate nonrecurring loop conditioning charge.

> More fundamentally, however, the CLECs challenge the propriety of requiring them to bear the costs, even if accurately estimated . . [T]he very notion of

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[30] *Joint Complaint of AT&T Communications of New York, Inc et al Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone Company's Tariff No 900*, Case No 95-C-0657, Opinion No 97-2 (issued April 1, 1997).

[31] *Id* at 66 (emphasis added).

[32] *Id* at 83

[33] *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case No 98-C-1357, Opinion No 99-12 (issued December 17, 1999) ("*NY DSL Order*").

> costing on the basis of a need to condition copper loops is at odds with forward-looking pricing on the basis of TELRIC, inasmuch as a forward-looking construct would contemplate the use of fiber, as we recognized in Phase 1 of the First Network Elements Proceeding.

Responding to arguments that DSL is nothing more than "an interim fix", the CLECs presented a more enduring view of DSL

> DSL is not merely a transitional technology, but is forward-looking and forward-looking networks should be designed assuming widespread DSL deployment That view rests, at least in part, on the recognition that the "all-fiber network" contemplated by TELRIC means "all-fiber feeder," and that even the forward-looking network, for the foreseeable future, will continue to include copper distribution, for which DSL will need to be provided.[34]

In contrast, Bell Atlantic presents a more short-term opinion of DSL. In its view, DSL is nothing more than "an interim fix, intended only to enhance the ability of copper to transmit high-speed data and having no future in the all-fiber network; on that basis, forward-looking pricing of DSL appears almost oxymoronic."[35] In an effort to reconcile its desire to be compensated for loop conditioning based upon the embedded copper network, with the forward-looking assumption of a fiber feeder network, Bell Atlantic claimed that the FCC has implicitly rejected the use of the TELRIC standard and instead believes that loop conditioning must be analyzed from an embedded perspective

> "[T]he FCC itself has specifically authorized the recovery of deloading costs associated with CLEC requests for DSL-compatible loops," and that "the FCC understood that DSL transmission is inherently based on the use of embedded copper loop plant, and that its 'forward-looking' costs must be analyzed from that perspective "[36]

In its decision, the New York Public Service Commission rejected the argument of the CLEC community. Relying upon previous proclamations by the FCC that CLECs should bear

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[34] *Id* at 12 (footnote omitted, emphasis in original)

[35] *Id* at 11

the costs of loop conditioning, the New York Public Service Commission accepted Bell Atlantic's argument and allowed recovery of loop conditioning costs through a separate nonrecurring charge.

B. Massachusetts

In 1996, the Massachusetts D.P.U issued its order adopting the appropriate costing model to be used for the pricing of unbundled network elements. Similar to New York, the Massachusetts Commission was asked by Bell Atlantic to approve a model based upon a 100% fiber feeder assumption.[37] Despite CLEC arguments that the use of optical fiber in the feeder system of all loops is not the least expensive way of providing service, the Massachusetts Commission approved the Bell Atlantic model and the 100% fiber feeder assumption.[38]

Recently, the Massachusetts Commission undertook a review of the loop conditioning charges proposed by Verizon.[39] Again, Bell Atlantic relied upon earlier FCC statements that it claims entitles Verizon to recover the costs of conditioning the loop. "According to Verizon, the FCC acknowledged that when load coils and bridged taps are present on the copper loops, loop conditioning is required and the ILEC is entitled to recover the costs to remove the load coils to provision line sharing."[40] As it did in New York, Verizon also argued that the use of the

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[36] *Id* at 14-15

[37] *Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, et al, pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies*, Case Nos 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - - Phase 4 Order (issued December 4, 1996)

[38] *Id* at 16

[39] *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M D T E No 17, filed with the Department by Verizon New England, Inc d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective on October 2, 2000*, Case No 98-57 - - Phase 3 Order (issued September 29, 2000) ("*Massachusetts DSL Order*")

[40] *Id* at 104

forward-looking pricing methodology is inconsistent with an activity that is applicable to the embedded copper network "Verizon contends that the CLECs' position that a fiber-based network must be used for a forward-looking cost study for line sharing is 'untenable because it would effectively negate the FCC's requirement that the ILECs be allowed to recover certain costs associated with providing line sharing.'"[41]

Unlike New York, the Massachusetts Commission rejected Verizon's arguments and adopted the logic of the CLEC community. The Commission recognized the apparent inconsistency between TELRIC and loop conditioning.

> We concede the difficulty in reconciling pricing for a network element that in its very nature is based on the existence of copper plant with a network design that assumes 100 percent fiber feeder, but this difficulty flows directly from Verizon's own proposal in the earlier docket to use 100 percent fiber feeder in its TELRIC cost study. We note, however, that even in a network with 100 percent fiber feeder, there is still copper plant running from the DLC to the customer's premises. In such an environment, line sharing takes place only over the copper plant and does not require any line qualification or conditioning. That environment is the forward-looking telecommunications network that we use in this case to determine that Verizon shall not charge for any line qualification or conditioning.[42]

Additionally, the Massachusetts Commission rejected Verizon's argument that the FCC had provided blanket authorization for the recovery of loop conditioning costs.

> We believe that the FCC's directives related to recovery of loop qualification and conditioning costs are only relevant to states that have assumed copper feeder for purposes of calculating TELRIC The FCC has not directed states to assume copper feeder in calculating TELRIC, and, without such a directive, it would be illogical for the FCC to mandate the recovery of costs that are relevant only to a network assumption that may not have been approved in a particular state.[43]

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[41] *Id* at 104 (citations omitted)

[42] *Id* at 113

[43] *Id* at 114

As such, the Massachusetts Commission rejected Verizon's proposed tariff charges for loop qualification and loop conditioning.

C. Oregon

In 1998, the Oregon Public Utility Commission addressed the issue of loop conditioning.[44] In that docket, Staff argued that the costs associated with loop conditioning are included in the maintenance factors used to develop loop recurring rates. In order to prevent double recovery, Staff asserted that conditioning costs should not be included in nonrecurring rates paid by the CLEC. As a result, Staff proposed to eliminate US West's proposed nonrecurring loop conditioning charge.[45]

While agreeing with Staff, the CLEC community maintained that the cost of loop conditioning should not only be eliminated from nonrecurring charges, but also removed from the monthly loop recurring charge. As presented by the CLECs, unloaded, data compatible loops represent forward-looking technology. Given this forward-looking assumption, the requesting party should not be responsible for compensating the ILEC for loop conditioning.[46]

In its decision, the Oregon Commission agreed that loop conditioning "should continue to be recovered through recurring charges." Noting that recurring charges were not in issue in this proceeding, the Oregon Commission refused to address the issue whether loop conditioning costs should be precluded on the basis that unloaded loops represent least cost technology.[47]

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[44] *In the Matter of the Investigation into Compliance Tariffs filed by US West Communications, Inc., Advice Nos 1661, 1683, 1685, and 1690*, Docket Nos. UT-138 and UT-139, Order No. 98-444, issued November 13, 1998.

[45] *Id.* at 57.

[46] *Id. at 57.*

[47] *Id. at 58.*

IV. THE CONFUSION CAUSED BY THE CURRENT FCC PRICING RULES HAS BEEN EXPLOITED BY SOME ILECS AND HAS DETERRED THE UBIQUITOUS DEPLOYMENT OF ADVANCED SERVICES.

As mentioned previously, the FCC initially discussed the requirement that ILECs provide conditioned loops in the *First Report and Order*. While the FCC placed an affirmative duty on the ILEC to "condition the loop to permit the transmission of digital signals," the Commission also provided that the ILEC would be compensated for the cost of conditioning the loop. The Commission, however, expressly premised such recovery on the application of the Commission's TELRIC pricing standard. Later, in the *UNE Remand Order*, the FCC reaffirmed the requirement that ILECs provide conditioned loops. Again, the Commission concluded that "the incumbent should be able to charge for conditioning such loops." Similar to the previous decision, the Commission required any recovery of conditioning costs to be based on the TELRIC pricing standard.

Unfortunately, these FCC statements are usually touted by ILECs as a blanket authorization for the recovery of conditioning costs through a separate nonrecurring charge. Possibly as a result of the brevity of the TELRIC pricing standard discussion found in these two determinative decisions, these ILECs inevitably fail to mention the requirement that their recovery of conditioning costs be based upon a forward-looking costing standard. As a result, the state commissions are routinely confronted with claims such as these made by Verizon in Massachusetts

> Verizon argues that the FCC permits it to charge for conditioning loops According to Verizon, the FCC acknowledged that when load coils and bridged taps are present on the copper loops, loop conditioning is required and the ILEC is entitled to recover the costs to remove the load coils to provision line sharing. Verizon contends that the CLECs' position that a fiber-based network must be used for a forward-looking cost study for line sharing is "untenable because it

> would effectively negate the FCC's requirement that the ILECs be allowed to recover certain costs associated with providing line sharing."[48]

Verizon made similar claims in the New York proceeding.

> It [Verizon] adds that "the FCC itself has specifically authorized the recovery of deloading costs associated with CLEC requests for DSL-compatible loops," and that "the FCC understood that DSL transmission is inherently based on the use of embedded copper loop plant, and that its 'forward-looking' costs must be analyzed from that perspective."[49]

In addition to Massachusetts, New York, and Oregon, several other state commissions have reviewed costs for conditioning local loops In the vast majority of these cases, the ILECs and the state commissions have looked upon the FCC's pronouncement allowing recovery for loop conditioning costs as a blanket authorization.[50] As a result, the issue regarding the apparent paradox - between a forward-looking standard to set prices and the application of such prices to the embedded network – has never been fully developed.

As will be shown in the next section, the belief that the FCC has made a blanket authorization for the recovery of loop conditioning nonrecurring charges has led to the imposition of conditioning costs that are often astronomical. The burden of these costs inevitably consumes the limited capital of the CLECs and thus deters the ubiquitous deployment of advanced services

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[48] Massachusetts DSL Order at 104 (citations omitted, emphasis added)

[49] NY DSL Order at 14-15

[50] See, Kansas Corporation Commission Docket No 99-SCCC-710-ARB, Direct Testimony of John P Lube, filed on behalf of Southwestern Bell Telephone Company, filed August 3, 1999, at page 19 In that testimony, Southwestern Bell Telephone Company quotes the FCC's statement that CLECs "bear the cost of compensating the incumbent LEC for such conditioning " In its quote, however, SWBT conveniently omits the attached FCC footnote requiring the cost of such conditioning be based upon the TELRIC standard

V. REQUESTED RELIEF

A. The Commission Should Clarify the TELRIC Pricing Standard In Regards to Loop Conditioning

Consistent with the FCC's pledge to "continue to review this [TELRIC] costing methodology, and issue additional guidance as necessary", Mpower requests that the FCC eliminate the ongoing confusion by renewing its commitment to TELRIC based costing As a necessary corollary of this renewed commitment to the TELRIC costing standard, Mpower asks the FCC to recognize three fundamental tenets of the TELRIC methodology. First, historical and current network design standards preclude the placement of load coils on loops less than 18,000 feet. Second, these same historical and current network design standards mandate the efficient utilization of fiber feeder and digital loop carriers in all loops greater than a certain length. As such, the copper portion of any fiber fed loop would be truncated to such a degree that load coils would become unnecessary. Finally, the TELRIC based monthly recurring charges approved by the state commissions, because they are premised upon these historical and current network design standards, implicitly reflect the cost of providing an unloaded, data capable loop.

Thus, given that the monthly recurring charge is based upon such a data capable loop, it would constitute double recovery to allow the ILEC to recover, via a separate nonrecurring charge, the costs of bringing the loops in their embedded network up to a standard consistent with TELRIC. Effectively, these ILECs are asking CLECs to pay, through the monthly recurring charge, to build and maintain a new data capable network while also paying, through the nonrecurring loop conditioning charge, to rebuild the old, embedded network.[51]

[51] Effectively, the renewed commitment to TELRIC and adoption of these clarifications will eliminate all separately imposed nonrecurring loop conditioning charges In addition to the obvious pro-competitive effect of such a decision, this proposal will also eliminate the dilemma of how to apportion loop conditioning costs among both the current user and future entrants who may benefit As the Commission specifically recognized in paragraph 383 of the *First Report and Order*, such costs should be "imposed equitably among entrants." Currently, the nonrecurring

Recognizing that the TELRIC standard is premised upon both design standards and the network modeling undertaken to produce recurring and nonrecurring loop cost studies, Mpower has attached hereto and made a part hereof a comprehensive analysis of loop conditioning activities and costs.[52] This analysis, prepared by QSI Consulting, discusses the evolution of various network design standards as well as the design standards utilized by state commissions in developing monthly loop costs Furthermore, the analysis details the ongoing conflict that has arisen as a result of some statements contained in the *UNE Remand Order*.

1. Under Historical Network Standards and the TELRIC Pricing Methodology, Loops Less Than 18,000 Feet Would Never Need Loop Conditioning.

It is well recognized that historical network design standards have precluded the placement of load coils on loops less than 18,000 feet for approximately 2 decades. In the attached analysis, QSI discusses the evolution of various design architectures as well as the network design standards currently utilized by the incumbent LECs

> [F]rom the early 1980's The Bell System (AT&T), via its "Revised Resistance Design" and "Carrier Serving Area" standards, required that the Regional Bell Operating Companies (RBOCs) - and perhaps others - design their outside plant networks such that any loops extending less than 18,000 feet from a serving central office would be provisioned without load coils and with minimal bridged tap [53]

CLECs and ILECs, as well as the FCC, have recognized the ubiquitous adoption of this design standard. In its Joint Petition for Reconsideration of the UNE Remand Order, Covad and Rhythms brought this fact to the Commission's attention.

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charge is imposed solely on the first entrant and no provision made for *pro rata* refunds and a separate charge to future entrants

[52] *"Conditioning" Outside Plant Facilities For Provisioning Advanced Services*, prepared by QSI Consulting on behalf of Mpower Communications (*"QSI Analysis"*)

[53] QSI Analysis at pages 4-5